APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-1575

D. C. Docket No. CA 70-1853

DAVID KASNER and JOAN KASNER,
Plaintiffs-Appellants,

versus

H. HENTZ & CO. and RALPH NERNBERG,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

March 15, 1973

Issued as Mandate:

APPENDIX B

[TITLE OMITTED]

(March 15, 1973)

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Plaintiffs-appellants, customers of H. Hentz & Co., a brokerage firm, brought suit against the firm and Ralph Nernberg, its registered agent, to recover damages allegedly occasioned by Nernberg's false dealings and breach of trust in handling plaintiffs' discretionary stock account. More particularly, plaintiffs sought damages from Nernberg and Hentz on three theories: (1) violations of 15 U.S.C. §78j, 15 U.S.C. § 78o(c)(1)-(2) and Securities Exchange Commission Rules 10b-5 and 15(c)(1)-(2) promulgated thereunder; (2) negligent failure to properly supervise and administer a discretionary account in violation of New York Stock Exchange Rules 401 and 405 and (3) violations of the applicable securities laws, Florida Statutes Annotated § 517.301.

Jurisdiction was asserted and is found under 28 U.S.C. §§ 1331 and 1337; § 22(a) of the Securities Act of 1933 [15 U.S.C. § 77v(a)], and § 27 of the Securities Exchange Act of 1934 [15 U.S.C. § 78aa]. Pendant jurisdiction over plaintiffs' counts alleging state securities law violations and common law negligence is also present. McCurnin v. Kohlmeyer & Co., ____ F.2d ____ (5th Cir., 1973) [No. 72-3175, February 13, 1973].

JUDGMENT

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The gravamen of plaintiffs' complaint was that after suffering near disastrous losses in the stock market with a portfolio structured for a market decline, Dr. and Mrs. Kasner approached their broker Nernberg in September of 1969, intending to direct him to liquidate their holdings. Rather than lose an actively trading account and its attendant commissions, Nernberg, plaintiffs' allege, induced the Kasners to give him trading authority over their stock portfolio and to restructure it for a rising market. Plaintiffs testified that when they approached Nernberg to liquidate their holdings, he said to them:

> "And he said to me this would be [the] worst mistake you could make. Let me turn it around, and I'll make your money back in two years; and that he would be the manager of the account. He would take it off my hands, I wouldn't have to worry about it, I could go back to my doctoring, and I wouldn't have to look at these statements — I couldn't read anyway — No matter what they said, I couldn't read these statements; I didn't understand them. And so he offered me to take it over, he would manage it — he was an expert, a professional. I'd already learned that I could not handle the account any more; I was an amateur. I couldn't learn enough to handle this stuff. So — And here he was offering me to take it off my hands, take it over, make money back in two years.
>
> "I said, "Fine, then take it over,' and that's essentially how he got the account."

In support of the Kasner's allegations that Nernberg had induced them to remain in the market with a disastrous result, plaintiffs introduced the discretionary authorization they had executed in Nernberg's favor in September of 1969. They also introduced evidence which showed that when signed over to Nernberg's discretion plaintiffs' portfolio, though below margin requirements, had a net equity in excess of $50,000. Less than nine months later, after active trading by Nernberg and maintenance calls, plaintiffs' equity in the account had been reduced to about $3000. Plaintiffs further showed that all transactions occurring in this period of time were initiated solely by defendant Nernberg under the supervision of Hentz & Co. and that plaintiffs had continued the account only at Nernberg's insistence.

In defense of the action Hentz relied on the testimony of Nernberg that he had not guaranteed results, nor that he had fraudulently or negligently managed the account. Defendants further relied on evidence that in the course of the decline in plaintiffs' equity, they had sent plaintiffs numerous notifications that their account was declining. The defense contended that given such knowledge plaintiffs could not justifiably have relied on Nernberg's management. At the close of the testimony on defendants' motion, the district court granted a directed verdict for the defendants.

We reverse as jury questions on several controverted facts appear in this record. Boeing v. Shipman, 411 F.2d 365 (5th Cir., 1969), required that the case be submitted to the jury, the appropriate forum for determination of whether false statements were made, if so whether they were material, and if plaintiffs were justified in their

reliance thereon. Evans & Co. v. McAlpine, 434 F.2d 100 (5th Cir., 1971); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2nd Cir., 1972); Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 337 F.Supp. 107 (N.D. Ala., 1971); Hecht v. Harris, Upham & Co., 283 F.Supp. 417 (N.D. Calif., 1968); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bocock, 247 F.Supp. 373 (S.D. Tex., 1965).

In arguments over the motion for directed verdict, plaintiffs suggested that the case already tried be sent to the jury which had heard it, then should the verdict be against defendants the court could properly consider a defense motion for a judgment n.o.v., which, should the court grant it and later be reversed, would obviate the need for a retrial. This suggestion was not followed and we consequently must remand this cause for re-trial.

The order of the district court is REVERSED and the cause REMANDED.

APPENDIX C

(Titled Omitted)

[Filed April 4, 1973]

ON PETITION FOR REHEARING

(April 4, 1973)

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

[TITLE OMITTED]

April 18, 1973

Messrs. Sidney M. Aronovitz

Richard R. Booth

Attorneys at Law
908 Ainsley Building
Miami, Florida 33132

No. 72-1575 — David Kasner and Joan Kasner vs.

H. Hentz & Co. and Ralph Nernberg

MANDATE STAYED TO: May 18, 1973

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/Maryette K. Farley
Deputy Clerk

enc.

cc: Mr. Michael Nachwalter

APPENDIX E

[TITLE OMITTED]

[Filed January 17, 1972]

FINAL JUDGMENT FOR DEFENDANTS ON DIRECTED JURY VERDICT

This cause came on for trial before the court and a jury. The plaintiffs having presented their case and issues in full and having thereupon rested, the defendants, H. Hentz & Co., a partnership, and Ralph Nernberg, jointly and severally, moved for the entry of a directed verdict for the defendants. The court, after hearing argument by respective counsel and being otherwise fully advised in the premises, thereupon directed the entry of a verdict by the jury for the defendants, H. Hentz & Co. and Ralph Nernberg, jointly and severally, on each count of the complaint, namely, Counts I, II, III and IV. It is, accordingly,

ORDERED and ADJUDGED that the plaintiffs, David and Joan Kasner, take nothing, that the action upon plaintiffs' complaint is dismissed on the merits, and that each party shall bear his own costs. It is further

ORDERED and ADJUDGED that the motion of the defendant, H. Hentz & Co. to dismiss its counterclaim is granted, and the counterclaim is dismissed.

DONE and ORDERED at Miami, Florida, this 17th day of January, 1972,

EMMET C. CHOATE
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX F

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
June 6, 1934, c. 404, § 10, 48 Stat. 891.

APPENDIX G

TRADING AUTHORIZATION LIMITED TO PURCHASES AND SALES OF SECURITIES AND COMMODITIES

MESSRS. H. HENTZ & CO.
72 Wall Street
New York 5, N.Y.

Dear Sirs:

I hereby authorize RALPH NERNBERG whose address is 2020 Country Club Prado, C. Gables, Florida, to

buy, sell and trade in for my account and risk and in my name, stocks, bonds and any other securities and/or commodities and/or contracts relating to the same, on margin or otherwise and in accordance with your terms and conditions. In all such purchases, sales or trades he is authorized to act for me and in my behalf in the same manner and with the same force and effect as I might or could do if personally present, and you are authorized to follow his instructions in every respect concerning my account(s) with you; and I hereby agree to hold you harmless from any to pay you promptly on demand any and all losses arising therefrom or debit balances due thereon.

This authorization and this indemnity shall be continuing and shall remain in full force and effect until you receive from me written notice of my revocation thereof, and shall inure to the benefit of your firm, its successors and assigns, irrespective of any change or changes at any time in the personnel of your said firm, its successors and assigns for any cause whatsoever.

/s/ David Kasner

/s/ Joan Kasner

Dated, Nov. 14, 1969

Specimen signature of authorized Agent:

/s/ Ralph A. Nernberg